

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
19,535-s76H BY LARRY CAMPBELL)

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on March 15, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Order.

Exceptions to the Proposal for Decision were filed by the Applicant, Larry Campbell, with the Hearing Examiner. Those exceptions are addressed below:

EXCEPTIONS TO PROPOSED ORDER AND RESPONSES TO EXCEPTIONS:

1. Exception: The Applicant requests any amount of water for any period of time.

Response: The Proposed Order and Final Order must be based on the hearing record. At the hearing the Applicant stated that water was useful only if available for the entire period requested, which is from April 15 to October 15, inclusive, of each year. The Proposed Order cannot be altered by a change of testimony submitted after the record is closed.

2. Exception: The Applicant, the Objectors' witness and the Department Hydrologist all stated and were not challenged by anyone at the hearing that water on the surface on the Applicant's property becomes groundwater and thus not part of the source of supply.

Response: Only the Applicant made such a statement at the hearing, and this statement was challenged by the Objectors. The Objectors' witness did state that waters in the source of supply go underground,

but that they then surface again. The Department's hydrologist stated that Rye Creek is a gaining stream late in the season and a losing stream early in the season.

3. Exception: That the use of water for eating and drinking is beneficial.

Response: The Application was for irrigation purposes only, not domestic. Further, the Applicant testified that the water would be used for a garden. Garden crops require water throughout the irrigation season not just for a couple of months in the spring.

4. Exception: That the water could be used in January in a greenhouse.

Response: The Application is for April 15 to October 15 only. The period of appropriation cannot be extended without going through another public notice.

FINAL ORDER

Application for Beneficial Water Use Permit No. 19,535-s76H by Larry Campbell is hereby denied.

NOTICE

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 15th day of April, 1980.

David L. Pengelly
DAVID L. PENGELLY, D.N.B.&C.
HEARING EXAMINER

CASE # 19535

BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *
 IN THE MATTER OF APPLICATION FOR)
 BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
 19,535-s76H BY LARRY CAMPBELL)
 * * * * *

Pursuant to the Montana Water Use Act and the Montana Administrative Procedures Act, after due notice, a hearing was held on December 18, 1979, in the Courtroom of the Ravalli County Courthouse, Hamilton, Montana, for the purpose of hearing objections to the above-named Application for Beneficial Water Use Permit No. 19,535-76H, David Pengelly, Hearing Examiner, presiding.

The Applicant, Larry Campbell, appeared at the hearing and presented testimony in support of the Application. Mr. Campbell was not represented by legal counsel. No exhibits were introduced supporting the Application.

Two Objectors attended the hearing and presented testimony or statements. The Objectors, Bob Recht and Roger Conner, were not represented by legal counsel. Bob Recht introduced one (1) exhibit supporting his objection, to wit:

OBJECTOR'S EXHIBIT:

O-1 Summary of Rye Creek Decree, Case No. 6281, August 1, 1935

The Objector's Exhibit was marked accordingly and received into the record without objections. Also present and testifying on behalf of the Objectors was Fred Thorning.

Montana Department of Natural Resources and Conservation personnel present and testifying on behalf of the Department were Larry Brown,

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1 Hydrologist; Arlin Krogstad, Hearing Representative; and Jan Mack,
2 Missoula Water Rights Bureau Field Office Manager. Also present was
3 Vicki Woodrow, Hearing Recorder. The Department was not represented by
4 legal counsel. No exhibits were introduced by the Department.

5
6 SUMMARY OF RECORD

7 1. On July 18, 1978, the Department received an Application for
8 Beneficial Water Use Permit No. 19,535-s76H by Larry Campbell to ap-
9 propriate 15 gallons per minute of water, not to exceed 5 acre-feet per
10 annum from Rye Creek, a tributary of the Bitterroot River in Ravalli
11 County, Montana. The water is to be diverted from Rye Creek by means of
12 self-sustaining ram at a point in the NW1/4 NE1/4 NE1/4 of Section 33,
13 Township 3 North, Range 20 West, M.P.M., and used for new irrigation on
14 a total of 2 acres, more or less, in the NE1/4 of said Section 33, from
15 April 15 to October 15, inclusive, of each year.

16 2. On November 8, 15, and 22, 1978, the Department caused to be
17 duly published in the Ravalli Daily Republic, Hamilton, Montana, notice
18 of the above Application for Beneficial Water Use Permit No. 19,535-
19 s76H.

20 3. On December 18, 1978, the Department received an objection to
21 the above Application from Roger B. Conner.

22 4. On December 27, 1978, the Department received an objection to
23 the above Application from Robert F. Recht.

24 5. The Applicant, Larry Campbell, testified that he believes water
25 from Rye Creek is available for appropriation on his property, even
26 though Rye Creek may be dry further downstream. The Applicant stated
27 that he believes Rye Creek water flows on the surface in the vicinity of
28 his property and then goes underground and becomes unavailable for

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1 downstream users; therefore, the Applicant believes that his appropriation
2 of water would not adversely affect downstream users since the water
3 would not be available for their use whether he takes it or not. Under
4 cross-examination, the Applicant stated that he did not expect there
5 would be much, if any, return flow to Rye Creek from his irrigated lands
6 if this permit were granted. The Applicant feels that he would only be
7 applying enough water to meet the crop requirements and therefore there
8 would be little, if any, return flow to Rye Creek. The Applicant further
9 stated that the flow in Rye Creek fluctuates widely during the year,
10 based on personal observation over the past three (3) years.

11 6. The Objector, Bob Recht, stated that he believes surface water
12 and ground water along Rye Creek are interconnected; if the Applicant
13 removed surface water from Rye Creek then, further down the Creek,
14 surface water would have to go underground to maintain the equilibrium
15 between the surface water and ground water, thus leaving less surface
16 water downstream for use by prior appropriators. Mr. Recht stated that
17 he has lived on Rye Creek since 1975, and during that period of time has
18 had to adjust his irrigation program during periods of water shortages,
19 which occur fairly often. Mr. Recht uses a traveling-gun sprinkler
20 system with a capacity of 450 gallons per minute. Every year he has to
21 either shut the system off or nozzle it down. At a diversion rate of
22 300 gallons per minute there are times when the Objector, Mr. Recht, is
23 able to completely dry up Rye Creek. There are 632 miner's inches of
24 decreed water listed on Rye Creek (Exhibit O-1) and the Objector does
25 not feel that this volume of water is available except during high water
26 in the spring. Mr. Recht has decreed rights for 292 miner's inches on
27 Rye Creek and currently is using 165 miner's inches on Rye Creek.

28 7. Fred Thorning, an observer, testified that he has lived and
watched Rye Creek for 50 to 60 years and during that period has only

1 observed approximately 5 years when there was sufficient water for flood
2 irrigation of lands along Rye Creek. Mr. Thorning also testified that
3 the high water period on Rye Creek generally lasts up to June, and
4 usually drops off quite rapidly. Mr. Thorning does not feel that there
5 are any unappropriated waters in Rye Creek except during high water in
6 the spring.

7 8. Roger Conner, an Objector, testified that he was born and
8 raised on the ranch he currently owns. Mr. Conner testified that during
9 this period they've always had short water periods, and that the availability
10 of water for Mr. Conner is dependent upon upstream users. Mr. Conner has
11 the last point of diversion on Rye Creek. Mr. Conner feels that even
12 small diversions upstream would adversely affect his prior right. Mr.
13 Conner testified that occasionally during the late part of the irrigation
14 season excess water does pass his point of diversion, but quite often
15 this is because somebody up above him on Rye Creek has made a change in
16 their irrigation system and allows an excess of water to run down the
17 creek. Mr. Conner irrigates approximately 100 acres with Rye Creek
18 water. He can divert the entire flow of Rye Creek and does so quite
19 often during the irrigation season.

20 9. Larry Brown, Department Hydrologist, testified that base flows
21 in Rye Creek are in a range of five (5) to eight (8) cubic feet per
22 second (200 to 320 miner's inches). Mr. Brown further testified that
23 once Rye Creek leaves the mountains and spreads out into the Bitterroot
24 Valley it gets into the Bitterroot River alluvium which has much larger
25 pore spaces than the under ground material upstream and that it takes a
26 lot of water to fill these pore spaces. Mr. Brown testified that Rye
27 Creek is a gaining stream late in the season and a losing stream during
28 the spring runoff period.

1 10. Jan Mack, Missoula Water Rights Bureau Field Office Manager,
2 testified that on September 25, 1979, Rye Creek was running into the
3 Bitterroot River with Roger Conner's diversion ditch filled to capacity.

4 11. Bob Recht stated that it was probably not practical to give
5 the Applicant a water right from the period of April 1 to May 30 since
6 the Applicant would really need the water later in the summer once he
7 got a crop planted. The Applicant, Larry Campbell, stated that the
8 water would not be useful to him unless he could obtain a permit to use
9 the water during the entire period for which he has applied for water.

10
11 PROPOSED FINDINGS OF FACT

12 1. That there are no unappropriated waters in the source of supply
13 after the spring runoff.

14 2. That the appropriation of Rye Creek waters by the Applicant
15 would adversely affect prior appropriators on Rye Creek.

16 3. That the Applicant cannot beneficially use the water if a
17 Provisional Permit is granted for less than the period requested.

18 4. That the proposed use is a beneficial use.

19 5. That the proposed means of diversion or construction are adequate
20 and the proposed use will not interfere with other planned uses or
21 developments for which a permit has been issued or for which water has
22 been reserved.

23
24 PROPOSED CONCLUSIONS OF LAW

25 1. Section 85-2-311, MCA, 1979, states that "The department shall
26 issue a permit if:

27 1. there are unappropriated waters in the source of supply:

28 a. at times when the water can be put to the use

proposed by the applicant;

1 b. in the amount the applicant seeks to appropriate; and

2 c. throughout the period during which the applicant

3 seeks to appropriate, the amount requested is available;

4 2. the rights of a prior appropriator will not be adversely
5 affected;

6 3. the proposed means of diversion or construction are adequate;

7 4. the proposed use of water is a beneficial use;

8 5. the proposed use will not interfere unreasonably with
9 other planned uses or developments for which a permit has
10 been issued or for which water has been reserved; . . ."

11 2. Based on the testimony presented at the hearing and information
12 available in the Department's file on this matter, it is concluded that
13 there are no unappropriated waters in the source of supply in the amount
14 requested throughout the period during which the Applicant seeks to
15 appropriate.

16 3. Based upon testimony presented at the hearing and information
17 in the Department's file on this matter, it is concluded that the rights
18 of prior appropriators would be adversely affected if this permit were
19 granted.

20 4. Based upon testimony presented at the hearing and information
21 present in the Department's file on this matter, it is concluded that
22 the proposed means of diversion or construction are adequate; the proposed
23 use of water is a beneficial use; and the proposed use will not interfere
24 unreasonably with other planned uses or developments for which a permit
25 has been issued or for which water has been reserved.

26 Based on the above Proposed Conclusions of Law, the following
27 Proposed Order is hereby made:
28

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PROPOSED ORDER

1. Application for Beneficial Water Use Permit No. 19,535-s76H by Larry Campbell is hereby denied.

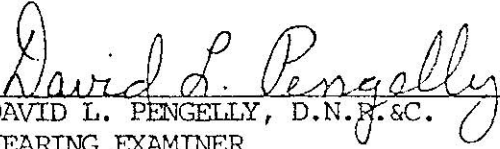
NOTICE

This Proposed Order is offered for the review and comment of all parties of record. The review and comment period shall commence with the mailing of this Proposed Order and shall end fifteen (15) days thereafter. No extensions of time for comment shall be granted.

The Final Order in this matter shall be sent to all parties by certified mail.

The Hearing Examiner's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DATED this 15th day of March, 1980.


DAVID L. PENGELLY, D.N.R.&C.
HEARING EXAMINER

CASE # 19535